No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION,
CONSUMERS UNION,
CONSUMER FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether decisions of the California Public Utilities Commission violate the First Amendment of the U.S. Constitution by compelling an investor-owned utility to disseminate in its monthly billing envelope the communications of a third party.

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BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Edison Electric Institute (EEI) hereby submits its brief *amicus curiae* in support of Appellant Pacific Gas and Electric Company (PGandE). Appellant requests this Court to reverse the final judgment of the Supreme Court of California denying a writ of review of decisions of the Public Utilities Commission of the State of Cali-

fornia (Commission) and to direct that court to vacate the Commission decisions. EEI supports Appellant because those decisions violate First Amendment rights under the United States Constitution by compelling Appellant to disseminate in its monthly billing envelope the communications of a third party.

EEI has obtained the written consent of all parties to this case for the filing of this brief pursuant to Rule 36.2 of this Court. The written consents have been filed with the Clerk of the Court.

INTEREST OF EDISON ELECTRIC INSTITUTE

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve approximately 96 percent of all customers of the investor-owned segment of the electric utility industry and 73 percent of the nation's electricity users.

EEI member companies have a substantial interest in this case because of the significant constitutional principles at stake. The Commission decisions involve fundamental First Amendment rights. Those rights will be violated when, pursuant to the Commission decisions, a utility is deprived of the customary use of its billing envelope to communicate with its customers, or is forced to send the messages of a third party in the envelope and is thereby compelled to speak when it ordinarily would not do so.

EEI and its members undertake many programs to enhance public understanding of the utility business and support increased consumer understanding of energy issues and utility ratemaking. State regulatory commissions are similarly interested in advancing public understanding in these areas. EEI members must object, however, whenever regulation designed to accomplish these objectives violates their First Amendment or other constitutional rights.

The constitutional questions arising in the instant case are present in actions that have been taken or considered in at least eighteen states.[1] An increasing interest in obtaining access to utility mailings has been evident in recent years. Because of this trend and its implications, EEI members have a strong interest in having this Court uphold their First Amendment rights in the face of these actions and proposals.

SUMMARY OF ARGUMENT

The constitutionality of the Commission decisions cannot be determined by application of standards governing reasonable time, place, or manner regulation of speech. Rather, the decisions compelling PGandE to disseminate the messages of a third party and to associate with that party's views result in an abridgment of First Amendment rights that must be evaluated under the most rigorous constitutional standards. Moreover, even if the Court were to employ the time, place, or manner test for evaluating the constitutionality of the Commission decisions, those decisions would fail to satisfy that test's requirement that the regulation of speech be content neutral.

The constitutional standard that must govern this case requires a compelling state interest in regulating speech and a narrowly drawn means to achieve that end. Neither element has been demonstrated by the Commission.

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[1] We previously noted fifteen jurisdictions in which state legislatures and commissions have been and are considering proposals to create citizen utility boards with authority to include their messages in utility billing envelopes or to authorize consumer groups to do the same. Brief of Edison Electric Institute as *Amicus Curiae* in Support of the Jurisdictional Statement at 4-6. We have since become aware of three additional jurisdictions in which the insertion of third-party messages in billing envelopes has been considered. *Vermont Public Interest Research Group, Inc.* v. *Central Vermont Public Service Corp.*, 39 PUR 4th 59 (Vt. P.S.B. 1980); H.B. No. 1143, 1985 Sess., Hawaii; S-1244, A-1460 and A-1468, 1984-85 Sess., New Jersey.

Finally, inclusion of regulatory notices in the billing envelope in the past will not support the Commission's present infringement of First Amendment rights. The billing envelope is the property of PGandE, and not a non-public forum under government ownership or control, and may be used by PGandE to the exclusion of all third parties.

ARGUMENT

EEI fully endorses the arguments presented in the Brief of Appellant Pacific Gas and Electric Company. PGandE's brief demonstrates that its First Amendment rights have been violated in two fundamental ways: its right to speak has been abridged, and its concomitant right not to speak or be associated with the speech of others has been infringed. This brief will not repeat all of the arguments made by PGandE. Rather, it will selectively focus upon arguments which we believe will assist the Court in its deliberations.

I. THE TIME, PLACE, OR MANNER DOCTRINE DOES NOT PROVIDE A BASIS FOR UPHOLDING THE COMMISSION DECISIONS.

The Commission asserts that its decisions comply with standards governing "reasonable time, place, or manner" restrictions on speech. Dec. No. 83-12-047, slip op. at 27-28; Jurisdictional Statement (J.S.) app. 20-21. In doing so, the Commission invokes this Court's opinion in *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530 (1980), where, indeed, the test for a permissible time, place, or manner restriction was articulated and applied. However, the Commission decisions reveal a fundamental misunderstanding of the holding of *Consolidated Edison* and the limitations imposed by the First Amendment upon governmental regulation of speech. The Commission has erred in two ways. First, the Commission has regulated speech based upon the content of the expression. Second, the Commission has done far more

than impose a restriction on PGandE's ability to express its own views. It has ordered PGandE to speak by disseminating the messages of Toward Utility Rate Normalization (TURN) when PGandE would otherwise choose silence.

A. The Commission Decisions Fail To Satisfy The Requirement That Time, Place, Or Manner Regulation Be Content Neutral.

As a threshold matter "a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Consolidated Edison*, 447 U.S. at 536 (footnote omitted). In that case the Court found that a ban on bill inserts addressing controversial issues of public policy could not be upheld as a reasonable time, place, or manner regulation because the government had placed itself in the position of ultimate arbiter of what information could be sent by a utility in its billing envelope. The state, in short, had regulated speech based upon its content, dictating what was useful information and what was prohibited. The Court unequivocally held such restriction on a utility's rights of speech "cannot be upheld as a content-neutral time, place, or manner regulation." *Id.* at 537.

Here too the Commission regulation is based upon content. The Commission decisions favor TURN's viewpoints at the expense of PGandE's, with the Commission as arbiter selecting the viewpoint it feels best serves its conception of the public interest. This Court has ruled repeatedly that the government may not regulate speech based upon content, *i.e.*, in a manner that favors one speaker over another based upon the content of their speech. *Consolidated Edison*, 447 U.S. at 535-36; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972) (unconstitutional to give special status to labor picketing); *Regan* v. *Time, Inc.*, —— U.S. ——, 104 S.Ct. 3262, 3266-67 (1984) (federal statute allowing one type of reproduction of U.S. currency and prohibiting an-

other based upon educational content of message ruled unconstitutional).

The Commission stated that its primary purpose was to determine "how to use the economic value of the extra space more efficiently for the ratepayers' benefit." Dec. No. 83-12-047, slip op. at 28; J.S. app. 21. *See also id.* at 6; J.S. app. 4. From the outset, the Commission's goal was to change the existing use of the billing envelope to allow a use which it considered "more efficient," and to benefit ratepayers by exposing them to a wider variety of views than they would otherwise receive from Appellant through its bill inserts. *Id.* at 23; J.S. app. 17. In *Consolidated Edison*, 447 U.S. at 537, this Court rejected the argument that a content ban on certain utility speech could be justified on the ground that it assured that "consumers will benefit from receiving 'useful' information." Similarly, in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247-48 (1974), the Court rejected a right to reply in a newspaper grounded on the assertion of a governmental obligation to ensure that a wide variety of views reaches the public. In this case the constitutional concern is that the state regulation relies upon a determination as to the value of one speaker's viewpoint versus that of another's.

The conclusion that the Commission engaged in prohibited content analysis is inescapable. Without evaluating the value of Appellant's and TURN's differing viewpoints, the Commission could not have concluded that inclusion of TURN's messages in the billing envelope four times per year would be a more beneficial use of space in the envelope than Appellant's continued use of its own billing envelope on those occasions. By favoring the inclusion of TURN's messages and displacing Appellant's, the Commission has made an impermissible and unconstitutional judgment about the content of Appellant's speech.[2]

[2] We have not addressed whether the Commission decisions have satisfied two other criteria in the test for a valid time, place, or manner restriction on speech, *i.e.*, whether it is narrowly tailored to serve a significant governmental interest and whether it leaves open alternative channels for communication. *Regan*, 104 S.Ct. at 3266-67; *United States* v. *Grace*, 461 U.S. 171, 177 (1983). Assuming *arguendo* that those requirements were met and the restriction on Appellant's speech were deemed to be content neutral, the state's regulation would still be unconstitutional. The Commission cannot rely, as it has attempted to do here, upon cases that have validated reasonable time, place, or manner regulation of speech on public property or at a public forum. Decision No. 83-12-047, slip op. at 27-28, J.S. app. 20-21; Commission Motion to Dismiss at 17-20. See *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (speech on streets, alleys, and thoroughfares); *Adderley* v. *Florida*, 385 U.S. 39 (1966) (speech on jail grounds); *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981) (speech at state fairgrounds). As discussed in Brief of Edison Electric Institute As Amicus Curiae In Support of The Jurisdictional Statement at 16-17, and Brief of Appellant Pacific Gas and Electric Company at 31-33, Appellant's billing envelopes are its own private property and not the property of ratepayers, the Commission, or any governmental entity. Nor has Appellant held the billing envelopes open to the public. Accordingly, the limited precedent authorizing reasonable time, place, or manner restrictions on speech occurring at public forums will not provide any cognizable basis for the restriction on Appellant's speech.

B. The Constitutionality Of An Order Compelling PGandE To Speak When It Seeks To Refrain From Speaking Is Not Governed By Standards Applicable To Time, Place, Or Manner Regulation.

The gravamen of a time, place, or manner regulation of speech is that it limits the exercise of an existing right of expression. Thus, in narrow circumstances, the government may limit the time, place, or manner in which individuals exercise their First Amendment rights by, for example, regulating access to public parks or facilities for purposes of speaking, or prohibiting sound trucks which emit loud or raucous noises on city streets. See, *e.g.*, *Clark* v. *Community for Creative Non-Violence*, —— U.S. ——, 104 S.Ct. 3065 (1984); *Kovacs* v. *Cooper*, *supra*. The essence of time, place, or manner regulation "lies in the recognition that various methods of speech,

regardless of their content, may frustrate legitimate governmental goals." *Consolidated Edison*, 447 U.S. at 536. Nothing in this case even remotely suggests, however, that PGandE's speech frustrates any legitimate governmental objectives. Rather, PGandE's speech, that is, its ability to disseminate its own words, is being restricted so that the voice of another may be heard. While this arguably may be a constitutionally acceptable result when the competing voices seek mutually exclusive use of public facilities, as in the case of parade and demonstration permits for public streets and parks, the facts here are significantly different.

PGandE's ability to use its billing envelope to communicate its own views is being restricted, and for reasons discussed above (see pp. 5-6, *supra*) this itself is an unconstitutional abridgment of its rights of expression. But even if one were to assume that the regulation restricting PGandE's First Amendment right to express its own views could otherwise satisfy the time, place, or manner standards, the Commission decisions would still fail to pass constitutional muster. Simply put, the time, place, or manner doctrine cannot be invoked to justify the Commission decisions because PGandE is being compelled to speak and to transmit TURN's messages in the billing envelope. This compulsion goes far beyond acceptable regulation which restricts the time, place, or manner of PGandE's speech. The Commission is not merely negating PGandE's ability to speak through its billing envelope, although this may well be one result of its decisions: it is also compelling PGandE to undertake the affirmative act of speaking and associating with TURN's views when PGandE would refrain from doing so absent state compulsion. The constitutionality of such compulsion cannot be determined by reference to standards applicable to a time, place, or manner restriction.

In *United States* v. *Grace*, 461 U.S. 171 (1983), this Court discussed the limited circumstances in which the time, place, or manner doctrine may be applied, and the

stricter standard that must be satisfied when the governmental invasion of the First Amendment freedom of expression goes beyond those limitations.

> It is also true that "public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." . . . In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." . . . *Additional restrictions* such as an absolute prohibition on a particular type of expression *will be upheld only if narrowly drawn to accomplish a compelling governmental interest.*

Id. at 177 (citations omitted and emphasis added). Clearly, a content-based restriction on speech and a governmental compulsion to speak or associate with the views of another are profound intrusions into First Amendment freedoms which demand scrutiny under the most stringent constitutional standards.

II. THE COMMISSION'S REGULATION OF PGandE's SPEECH IS NOT A NARROWLY TAILORED MEANS OF SERVING A COMPELLING STATE INTEREST.

The standard against which the Commission decisions must be weighed was articulated clearly by this Court in *Consolidated Edison:* a restriction on a utility's speech based upon content will survive only if it is a "narrowly tailored means of serving a compelling state interest." 447 U.S. at 535. Similarly, in *Wooley* v. *Maynard*, 430 U.S. 705, 716-17 (1977), this Court ruled that governmental action compelling an individual to disseminate the message of another will be sustained only if based upon

a compelling state interest that cannot be achieved by narrower means which are less restrictive of First Amendment rights.[3] The Commission has failed to demonstrate that its interest in regulating PGandE's speech is "compelling" or that its means of doing so is "narrowly tailored." Therefore, the Commission decisions cannot be sustained.

A. The State Interests Identified By The Commission Are Not Sufficiently Compelling.

The Commission stated the interests to be served by its decisions as "the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete [consumer] understanding possible of energy-related issues." [4] Dec. No. 83-12-047, slip. op. at 29; J.S. app. 22, *quoting* Dec. No. 83-04-020, slip op. at 17; J.S. app. 103. While these goals may be worthwhile, there can be no doubt that they fall far short of passing the compelling interest test.

[3] *Wooley* articulated the additional constitutional precondition, in the context of governmental efforts to compel individuals to carry the message of a third party, that the governmental interest underlying the regulation be ideologically neutral. In *Wooley*, 430 U.S. at 717, the regulation failed because the state's interest was dissemination of an ideological viewpoint. Similarly, the Commission in this case fosters a particular ideology, that of TURN. Notwithstanding the Commission's official pronouncements, the Commission cannot successfully contend that its interest in allowing TURN to obtain greater distribution of its viewpoints is "ideologically neutral." While the Commission has stated its interests as greater consumer participation in its proceedings and enhanced knowledge of energy issues, the Commission in practice has singled out a group with a particular ideological bent and given them access to the avenue of communication provided by Appellant's billing envelopes. Even if the Commission's generally stated interests are neutral, the manner in which the interests have been pursued, by using TURN as the mouthpiece, is not ideologically neutral. For this reason alone, the regulation cannot withstand constitutional scrutiny.

[4] These two interests, and not the litany of purported objectives recited by the Commission in its Motion to Dismiss at 17-18, are the sole and exclusive interests cited by the Commission decisions and, accordingly, are those which this Court should consider as the Commission's basis for regulating PGandE's speech.

The Commission's interests pale by comparison to interests determined to be non-compelling by this Court. *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (maintaining strict separation of church and state); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978) (sustaining active role of individual citizen in electoral process to maintain confidence in government and protecting shareholders whose views differ from those expressed in the political arena by corporate management). In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the government sought to limit campaign expenditures by federal political candidates, including expenditures made from their own personal resources. One of the governmental interests served by the expenditure ceilings was "equalizing the relative ability of individuals and groups to influence the outcome of elections. . . ." *Id.* at 48.

The governmental interest in *Buckley* is not unlike the objectives asserted by the Commission. In each instance the interest involves promoting balanced representation in a governmental decisionmaking process by enhancing the abilities of participants to influence the outcome. Yet in *Buckley* this Court found that equalizing participation in the electoral process was insufficient to justify the attendant infringement of fundamental First Amendment rights. The interest failed because "the concept that the government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Id.* at 48-49. So too in this case the governmental interest in widespread distribution of information and participation in Commission proceedings may not be served at the expense of Appellant's First Amendment freedoms.

B. The Means Employed By The Commission To Serve The State's Interests Are Not Narrowly Tailored Because A Panoply Of Less Repressive Means Is Readily Available.

Even if the state's interest in repressing Appellant's own speech and directing PGandE to distribute TURN's messages were somehow compelling—a proposition which we vigorously dispute—the Commission decisions still must fail. *Consolidated Edison* and *Wooley* require that the means selected to accomplish a compelling state interest be narrowly drawn. If a state has available a variety of means to achieve the desired end, it must choose the alternative which is least restrictive of First Amendment interests. *See Shelton* v. *Tucker*, 364 U.S. 479 (1960) (state statute unconstitutional because state interest in fitness and competence of publicly employed teachers could be served by means narrower than requirement that teachers report annually all organizations with which they have been associated over five-year period).

In this case, the state has before it a panoply of available alternatives which would further the Commission's objectives without infringing Appellant's First Amendment rights. For example, representation of consumer interests in Commission proceedings could be accomplished by enhanced state funding of the Commission's staff or direct funding of other entities. The state legislature could create a new entity with the sole objective of expanding consumer representation in Commission proceedings.[5] Moreover, consumer messages could be disseminated in state mailings, such as those which transmit tax returns or vehicle registration forms, or in public

[5] The state, for example, could create a consumer protection board, as is the case in New York (N.Y. Exec. Law § 550 *et seq.* (McKinney 1982)), or establish an agency specifically to represent the interests of ratepayers at public utility commission proceedings, as is done by the District of Columbia Office of People's Counsel. D.C. Code Ann. § 43-406 *et seq.* (1981).

service broadcast announcements. Similarly, the interest in developing understanding of energy-related issues could be accomplished by dissemination of information by the Commission itself or other state agencies, such as the California State Energy Resources Conservation and Development Commission. The state could employ its vast educational system as well to educate the public in this regard.

This Court has repeatedly held:

> [E]ven though the governmental purpose [is] legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton, 364 U.S. at 488 (footnotes omitted). The option selected in the Commission decisions is unconstitutional because it does not comply with this Court's longstanding mandate that the government adopt the least restrictive means of achieving its goal.

III. PAST INCLUSION OF LEGAL NOTICES IN THE BILLING ENVELOPE DOES NOT JUSTIFY THE COMMISSION'S REGULATION OF PGandE's SPEECH.

The Commission cannot legitimize the abridgment of PGandE's First Amendment rights by referring to prior inclusion of Commission-directed legal notices in the billing envelope. Dec. No. 84-05-039, slip op. at 3; J.S. app. 46-47. If probative of anything, such past practice explains only the evolution of the Commission's exercise of regulatory authority over the billing envelope and Appellant's acquiescence to the Commission's assertion of authority. This, of course, is a matter of state law which is neither before this Court nor precedent for the resolution of the constitutional issues raised by the Commission decisions.

Past Commission orders directing the inclusion of regulatory notices in the billing envelope (*e.g.*, availability of conservation programs and information, notices of applications for rate increases or of public hearings) are readily distinguishable from a requirement that PGandE publish or disseminate TURN's messages. First, the state's interest in disseminating notice of rate and service-related matters to utility customers differs significantly from its interest in establishing the self-appointed consumer group TURN as a funded participant in rate cases. The interest of ratepayers in receiving notice of potential changes in service or rates is more akin to a right of procedural due process which arguably may be compelling. Clearly, the state's interest in seeing that TURN's messages are transmitted has nothing to do with due process rights, and as demonstrated above (see pp. 10-11, *supra*), the interest is not otherwise compelling. Second, the specific means used to accomplish the notification of individual ratepayers of changes in rates and service are much more narrowly drawn than the indiscriminate access given to TURN by the Commission decisions. Indeed, the nexus between the Commission's avowed interests and the unfettered license granted to TURN to use PGandE's billing envelope is attenuated at best.

IV. THE LIMITED DOCTRINE ALLOWING GOVERNMENT TO RESTRICT SPEECH ON ITS OWN PROPERTY DOES NOT SUPPORT THE COMMISSION DECISIONS.

While past practice suggests that notice of rate and service changes has been included within the billing envelope, the Commission, by bootstrapping from its prior regulation of the billing process, cannot legitimately claim that utility billing envelopes are a "nonpublic forum on property 'owned or controlled by the government'." Commission Motion to Dismiss at 22. For obvious reasons the envelope and space within it cannot be considered

public property. And because the billing envelope and space within it are the private property of Appellant,[6] the Commission may not invoke the special proprietary interests cited in a limited class of cases to justify governmental restrictions on speech that bar access to public property which is not a public forum, or that allow the government to select among speakers on such property. See, *e.g.*, *Greer* v. *Spock*, 424 U.S. 828 (1976) (military base); *Adderley* v. *Florida*, *supra* (jail grounds); *City Council* v. *Taxpayers for Vincent*, —— U.S. ——, 104 S.Ct. 2118 (1984) (city-owned utility poles).

Specifically, this Court's ruling in *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37 (1983), is inapposite. In *Perry* the government gave access to an interschool mail system to one collective bargaining unit while excluding a rival union from such access. The *Perry* decision stands for the proposition that the government, because of its strong proprietary interest in certain public property, may condition speech on such property where it has not traditionally been held open as a public forum. This Court made clear in *Perry*, however, that "in *Consolidated Edison*, which concerned a utility's right to use its own billing envelopes for speech purposes, the Court expressly distinguished our public forum cases, stating that '*the special interests of a government in overseeing the use of its property' were not implicated.*" 460 U.S. at 50-51 n.9 (emphasis added). In this case, as in *Consolidated Edison*, the use of a utility's private property is involved, and precedent supporting exceptional regulation of a governmentally-owned but nonpublic forum will not support the Commission decisions.

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[6] The fact that public utilities are regulated or that customers pay through their rates for service does not change the nature of the utilities' property interest in materials and facilities used to provide that service. See, *e.g.*, *Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23, 32 (1926); *United Railways and Electric Co. of Baltimore* v. *West*, 280 U.S. 234, 249 (1930) (overruled on other grounds in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 606-07 (1944)).

CONCLUSION

For the foregoing reasons, *amicus curiae* Edison Electric Institute respectfully urges the Court to reverse the judgment of the Supreme Court of California and to direct that court to vacate the Commission decisions.

Respectfully submitted,

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